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IN THE

United States
Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants.

—vs—

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellee.

PETITION FOR REHEARING

On Appeal From the United States District Court for the District of Idaho, Northern Division.

JAMES F. AILSHIE,

Coeur d'Alene, Idaho.
Solicitor for Appellants.

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Appellants.

—vs—

THE WASHINGTON WATER POWER COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING

Now come the appellants and petition the court for a rehearing in the above entitled cause and base their petition upon the following grounds:

1.

That the court in the opinion heretofore filed herein failed to give due consideration to that part of the Act of Congress of February 15, 1901 (31 Stat. at L. 790) which provides "that any permission given by the Secretary of the Interior * * * * *shall not be held to confer any right,*

or easement or interest in, to or over any public land, reservation, or park."

2.

That the court appears to have applied to appellants the doctrine of estoppel wherein it said, "they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior." And in so doing the court failed to apply the closing paragraph of theAct of February 15, 1901, and failed to note or give due consideration to the rule promulgated by the Secretary of the Interior (Paragraph II of the Regulations, 31 L. D. 17) which was in force at the time appellants made their filings on these lands which rule is in the following words:

> "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

3.

That the opinion erroneously treats this license as a "right of way" and assumes, contrary to the statute, that some right or power was reserved by the government over the lands after the patent issued.

4.

That the opinion seems to assume that the permit or

license granted appellee was "coupled with an interest" in the lands whereas the Act of Congress expressly negatives any interest whatever.

REASONS FOR REHEARING

It is never an easy matter to apply to an appellate court for a rehearing. The difficulty of doing so arises (a) from the fact that one has already been defeated by the opinion of the court and is necessarily obliged to take issue with some or all of the positions taken by the court, and, (b) because to properly urge and present his contentions for rehearing he may seem to be impertinent or presumptuous.

Knowing, however, that the courts are always more anxious to properly construe the law and do justice than they are mindful of any pride of opinion, we take the liberty of stating herein frankly our position in the hope that we may be able to so emphasize it that the court may finally see the matter from our viewpoint. We think the court, in the very opening sentence of the opinion, began with an erroneous assumption, and that is the assumption that we are in some way or other chargeable with some kind of knowledge which would estop or preclude us from acquiring a clear title and exclusive right of possession to this tract of land. Perhaps our contention in this respect can be better expressed by asking a question than it can by attempting to state a negative. The question may be: How could the homesteader be in any way estopped by

knowledge of the fact that the company line ran across the land when at the same time he was confronted with the printed and official regulations of the department itself stating positively that:

> *"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."*

Could not the homesteader rely on the provisions of the closing paragraph of the Act of February 15, 1901, *and the foregoing regulation* of the Department and the generally accepted law that a license is revoked by a conveyance of the fee? This question is discussed at pages 20 to 24 of appellant's original brief and we will not further repeat it here more than to ask the court to give these matters its further consideration.

In the third paragraph of the opinion, the court says:

> "It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the Act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected."

The court must have misapprehended the position we have taken as we have never intended to concede or seem to concede that it was ever within the power of the Sec-

retary of the Interior to have issued a fee simple patent to this tract of land and at the same time to have reserved this license or permit right to either the government or the appellee. Under the land laws as enacted by Congress and the proclamation of the President extending them to the Coeur d'Alene Indian Reservation it became the absolute duty of the land department to either issue patents to these homesteaders upon their complying with the homestead laws or refuse to issue them. Congress had already told the Secretary, and everyone else, that any permits issued under the Act of February 15, 1901, "*shall not be held to confer any right or easement or interest in, to or over any public land.*" The Washington Water Power Company by reason of this permit acquired no better or greater right, title, interest or claim in, to or over this land than it would have had had it been a naked trespasser and built its line without any permit at all. The only difference in the world between the two is that after it is ousted or ejected after having had this permit it is not liable as a trespasser for the time it has been on the land, whereas: if it had been a trespasser, it would still be liable for damages and penalties as such after being ousted or ejected. If it had built this line without any permit and had been on the land as a trespasser at the time of the filing by appellants the subsequent issuance of patent would certainly not have vested in or left in the company *any right, license, or easement.* Now the question arises in the light of the closing paragraph of the Act of Feb-

ruary 15, 1901: What kind of right did Congress expect the licensee to have and receive when the land ceased to be public lands and became private lands? This court has failed to construe or interpret the Act of Congress of February 15, 1922, under which the permit in question was issued. This case rests solely on that Act and the regulations and acts of the Secretary thereunder and we think we are entitled to a direct and explicit construction and interpretation of the closing paragraph of the Act of Congress.

Again it is said in the opinion, "the government could not grant by patent or otherwise what it did not own nor anything more than it owned." This seems to assume a fact that does not exist, namely: that the appellee in this case had acquired *title to some kind of an interest or claim in or to this land.* But now let us see what the government owned at the time of the entry of this land by appellant and of the subsequent issuance of the patent. It owned the land and the absolute right of exclusive possession. It had given a permit to appellee to build its line across the land and Congress had said to appellant and appellee, and everyone else, that the Secretary of the Interior might revoke this permit at any time in his discretion and at the same time Congress had said that this permit "*shall not be held to confer any right or easement or interest in, to or over any public lands.*" What other or more language could Congress have used than it did use to preclude all notion of *any property interest in, to or over* the land pas-

sing by a permit? The words "*right* or *easement* or interest" cover all the property rights that can exist in real estate, and the words "*in, to* or *over*" cover *all manner* and *form of interest* or property right. Something else must be read into this Act in order to give a permitee an interest *in, to* or *over* the land. Now if the Washington Water Power Company, at the time appellants made their entry and later secured their patent, did not have "*any right or easement or interest in*" this land and did not have any "*right to, or over*" this land, *then what was it that appellee had* that the *government could not grant* or convey by patent? *This pertinent legal inquiry cannot be answered by the mere statement of the axiom that a grantor cannot grant any more than he owns.*

The further inquiry arises in this same connection: If this so-called permit or license remained in force after the patent was issued, *in whom remained the power to revoke it?* Was it in the Secretary or was it in the grantee? If the granting of the patent did not revoke the license then the company must have acquired something under the permit which Congress had taken the express precaution to say should not be granted by a permit; and this would lead to the further inquiry as to what Congress really did mean when it added, *as the very parting and closing words of the Act*, that the permission of the Secretary "*shall not be held to confer any right or easement or interest in, to or over any public land.*" We think that this court is squarely confronted with the necessity and importance of analyz-

ing and construing the foregoing language. We most respectfully submit that this language in the ordinary use of the English is incapable of being construed to permit anything more than a mere revokable license at will.

Finally, in concluding the opinion this honorable court says:

> "It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines with all incidental rights pertaining thereto to some other company or person or that its rights in the premises would have passed to its creditors in the event it had been unsuccessful in its business."

We make no contention that the appellee could not have sold and disposed of all *its property* but the *only property* it had across the land of appellants was its *poles and transmission wires.* It had *no right of way* and the grantee would have taken nothing more in the way of an easement or right of way than it would have taken, had the appellee been a naked trespasser. As to whether or not the purchaser from appellee would have legally been entitled to the benefit of the permit so as to protect it from thereafter being a trespasser, we express no opinion for the reason that it is wholly immaterial here. But clearly the purchaser from appellee could not have acquired any greater right than appellee had acquired and the Act of Congress had already stated what that right should be. Not only this but the Secretary of the Interior, by Regula-

tion Number 11, had promulgated to the public at large that the subsequent issuance to appellants of a patent should be "*of itself without further act on the part of the Department a revocation of the permission so far as it affects that tract.*"

For the foregoing reasons and considerations we most respectfully petition and pray the Court for a rehearing herein.

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